Franchise lawyers

[COMMITTEE OF LEGAL EXPERTS]

OBSERVATORY FRANCHISE CASE LAW

2006-2020

AEF
ASOCIACION ESPAÑOLA DE FRANQUICIADORES

Sabadell

Contents

Letter of presentation

The Committee of Legal Experts of the Spanish Franchise Association (AEF) has prepared this “Observatory of Franchise Case Law in Spain” for five consecutive years. This is a pioneering report at the global level in the field of franchising that presents the state of affairs of this business system in terms of the degree of litigation that is recorded between franchisors and franchisees in Spain.

The data emerging from the Observatory is very significant in terms of the scarcity of conflicts recorded each year between franchisors and franchisees. This fifth report analyses the period between 2006 and 2020, with an average litigation rate that remains at 0.09%, even though the analysis includes 2020, a year marked by the pandemic. This demonstrates that the franchise business model is not at all conflictive.

Furthermore, although it is commonly believed that it is franchisees who predominantly take matters to court to solve their problems with franchisors, this study reveals that the opposite is true. Thus, it is noted that most of the procedures are brought by franchisors, with an average of 60.39%. The Observatory goes even further by pointing out that the rulings issued by different Provincial High Courts or Courts of Justice are also favourable to franchisors, with an average percentage of 67.72%.

All these figures provide a realistic and objective view of the degree of litigation that occurs in the world of franchising today and give this study, which has been drawn up with seriousness, professionalism and independence, the importance it deserves within this business system, while clearing up any doubts about the conflicts between the parties that end up in the Courts.

By providing this specific data, the AEF has taken a further, and in this case decisive, step and demonstrated the maturity and strength of the franchise system and its self-regulation, which aims to reduce contentious matters and resolve any possible disputes out of court.

Luisa Masuet

Chairperson of the

Spanish Franchise Association

Letter of presentation

The Committee of Legal Experts of the Spanish Franchise Association (AEF) was created in 2004. Its members are lawyers appointed by the Board of AEF and are chosen on the basis of criteria of excellence due to their knowledge and practice in the franchise system.

Throughout its history, the Committee of Legal Experts has performed numerous activities, including preparing reports on draft legislation that effects franchising and carrying out advisory activities with the authorities that processed said regulations, adapting the European Code of Ethics for Franchising to Spain, mediating in conflicts affecting AEF members, as well as participating in numerous events that contribute towards raising awareness of franchising. The members of the committee are, moreover, arbitrators recognised by the World Intellectual Property Organisation, in addition to other national Courts of Arbitration.

The outreach tasks of the Committee include writing a regular newsletter, which is available online at **www.abogadosdefranquicia.com.**

On this occasion, I am pleased to present the fifth edition of the "Observatory of Franchise Case Law in Spain", which was created in 2017 as a tool at the service of the franchise system. The Observatory consists of a statistical study that offers a quantitative and qualitative x-ray of the degree of litigation in the field of franchising in Spain. This allows it to offer not only a statistical analysis of the number of judicial rulings related to franchises and their proportion in relation to the size of the sector, but also a qualitative analysis to determine the state of opinion of case law on the most important issues. This study was set up to be ongoing, as shown by the fact that this is the fifth edition.

Jordi Ruiz de Villa

Chairperson of the Committee of Legal Experts of the AEF

Partner of the Franchise Department at Fieldfisher JAUSAS

Letter of presentation

The Spanish Franchise Association (AEF) presents the 5th edition of the “Observatory of Franchise Case Law in Spain”. This is a pioneering report at the global level in the field of franchising that presents the state of affairs of this business system in terms of the degree of litigation that is recorded between franchisors and franchisees in Spain.

Franchising is growing rapidly across the world and global markets are proving receptive to this business model. The AEF Observatory Report indicates that the degree of litigation of the franchise business in Spain is very low. Franchise agreements in Spain are generally fair to both franchisors and franchisees. This also means that Spanish franchisors have a good opportunity to penetrate global markets.

I would like to take this opportunity to congratulate the Spanish Franchise Association (AEF), which created the Committee of Legal Experts in 2004. Its members are lawyers appointed by the AEF Board who are chosen on the basis of a criterion of excellence due to their knowledge and experience in the franchise system.

The AEF Committee of Experts has carried out numerous activities, including reporting on draft legislation affecting franchising and lobbying in collaboration with the European Franchise Federation (EFF) to the EU authorities for the implementation of the European Code of Ethics for Franchising. It is also responsible for mediating in disputes involving AEF members.

The World Franchise Council (WFC) is a non-political federation of 44 national franchise associations from around the world, together with 3 supranational bodies: the Asia-Pacific Franchise Confederation; the European Franchise Federation and the Federación Iberoamericana de Franquicias (FIAF).

Finally, I would like to congratulate the AEF on another successful project and wish them all the best.

Dr. Hatem Zaki

Secretary General of the World Franchise Council (WFC)

2017 - 2021

Letter of presentation

It has now been 25 years since Banco Sabadell took the first step on its journey in the franchise business model, accompanying franchising brands in their expansion and providing the necessary resources to entrepreneurs to start their new business as franchisees.

Over these years, we have worked hand in hand with the Spanish Franchise Association, which has helped us along the path to becoming leaders in the world of franchising, not only leaders in business, but leaders in experience and knowledge of the sectors which make up this model. In the field of franchising, Banco Sabadell has continued to provide specific financial products and services to cover the needs that have emerged, working closely with the brands and with their expansion so as to be close to the franchisees and drive the actions necessary to make this model grow. A business model which has been constantly growing and developing, in the good times and in the bad. And in this field, the relationships between the franchisors and franchisees may generate disagreements and the best way of analysing them is with their real data.

In this case, the AEF's Committee of Legal Experts presents us for the fifth year its report of the degree of litigation in the world of franchising in Spain. A good analysis of the last 15 years, both quantitative and qualitative, that shows us the main reasons for conflict and where we can observe the low level of litigation between franchisors and franchisees, which stands at an average of 0.09% with respect to establishments under franchise agreements. This gives us an idea of the low level of conflict existing in this business model and, if there are such incidents, the good level of communication to allow them to be solved out of court.

Gabriel Moyá

Director of the Franchise Department at Banco Sabadell

Methodology

Several databases were consulted in preparing this report, mainly Westlaw (publisher, Aranzadi), LALEYDIGITAL (publisher, Wolkers Kluwer) and CENDOJ, related to judgements of Provincial High Courts and of the Supreme Court (First Civil Chamber).

With respect to the previous edition, the judgements of 2020 have been included, as well as those of 2006 and 2007. This report therefore covers the period from 2006 to 2020. As the report covers 15 years, we believe that it is a sample with sufficient statistical value and that, therefore, even if we were to take more years into consideration, the results would not be significantly different.

Judgements issued by the Course of First Instance have not been taken into account as there is no reliable database that publishes all judgements passed in Spain. At this level of jurisdiction, both Westlaw (publisher, Aranzadi) and other databases consulted make a subjective selection of those judgements that they consider to be most significant, which means that statistical data cannot be obtained. Furthermore, arbitral awards have not been taken into account given the difficulty in obtaining information from the Arbitral Courts due to the confidential nature of the awards. Consequently, judgements of the High Courts of Justice related to appeals against arbitral awards have not been taken into account.

The judgements have been ordered according to the bodies that handed them down, and also according to the years (2006 to 2020). A classification has also been made, depending on whether the party instigating the process was the franchisor or the franchisee.

Finally, the activity sector has been analysed in order to bring it in line with the main financial figures of the franchise.

This analysis allows us to have a greater knowledge of the degree of litigation of an activity that in 2020 encompassed 58,032 franchise establishments, with a turnover of EUR16,844.45 million, and the main conflicts that arise between franchisors and franchisees.

At this point it should be mentioned that, since 14th March 2020, Spain has suffered a health and economic crisis caused by the COVID-19 pandemic and this has substantially altered the functioning of the Courts. The second additional provision of Royal Decree 463/2020, of 14th March, declaring a State of Alarm for the management of the health crisis caused by COVID-19, established the suspension of all procedural deadlines provided for in the procedural laws in all jurisdictions. Therefore, judicial activity was practically paralysed until 5th June 2020.

For this reason, the number of judgements in 2020 (38) is lower than in the two previous years.

Introduction

Between 2006 and 2020, a total of 648 judgements[1] were handed down in the field of franchising. The following table shows us the list of rulings in each year.

TOTAL JUDGEMENTS	648
2006	38
2007	55
2008	32
2009	40
2010	46
2011	44
2012	41
2013	45
2014	45
2015	33
2016	39
2017	39
2018	57
2019	56
2020	38

As can be seen, the number of rulings issued during the period under review is relatively stable, with between 38 and 46 rulings per year, with four exceptions. On the one hand, a lower than average number of rulings can be seen in 2008 and 2015 (32 in 2008 and 33 in 2015) and, on the other hand, a higher number of judgements can be seen in 2007 (55 in total), as well as an upward trend in 2018 and 2019, where the number of rulings rose considerably with regard to the average, with 57 judgements handed down in 2018 and 56 in 2019.

However, despite the upturn in the last two years, the total number of judgements shows that franchising is a system undergoing expansion that has a low litigation rate. There are probably more disputes than judicial ones, but the fact that they do not make use of the courts to resolve their differences shows that mediation, negotiation and/or conciliation systems are successful and allow the differences between parties to be resolved in a reasonable manner.

It should be noted that on 14th March 2020, Royal Decree 463/2020, of 14th March, was issued, declaring a State of Alarm for the management of the health crisis caused by COVID-19. The second additional provision of this royal decree established the suspension of procedural deadlines in all jurisdictions. This led to the judicial system in its entirety being paralysed until 5th June 2020, which undoubtedly influenced the fall in the number of judgements from 56-57 in the preceding years to 38 in 2020.

These figures are broken down below according to the body that issued the ruling.

[1] Including judgements handed down by the Supreme Court and Provincial High Courts

PROVINCIAL HIGH COURT JUDGEMENTS

TOTAL JUDGEMENTS	634
2006	37
2007	54
2008	32
2009	38
2010	45
2011	44
2012	36
2013	44
2014	44
2015	33
2016	39
2017	38
2018	56
2019	56

The number of judgements reflects a low level of litigation, regardless of the perspective from which they are analysed. Thus, when analysing the overall number of rulings between 2006 and 2020, the Provincial High Courts have ruled on 634 occasions on aspects relating to a franchise agreement, i.e., an average of 42.2 sentences per year.

The analysis by year shows that the number of judgements handed down by the Provincial High Courts in 2006 was low. However, in the following year (2007), litigation in the field of franchising recorded a significant upturn, with an abnormally high number of judgements. The number of judgements subsequently stabilised and between 2008 and 2017, a similar number of judgements were handed down, with an average of around 40 judgements per year.

In 2018 and 2019, an upward trend can be observed in the number of disputes that reached the Provincial High Court. This trend was cut short by the COVID-19 pandemic and the paralysis of the judicial system during the first State of Alarm declared on 14th March 2020.

The judgements according to whether the franchisor or the franchisee initiated the procedure are analysed below:

	TOTAL	INITIATED BY THE FRANCHISEE	INITIATED BY THE FRANCHISOR	IN FAVOUR OF THE FRANCHISEE	IN FAVOUR OF THE FRANCHISOR
TOTAL JUDGMENTS	634	255 (40.22%)	371 (58.51%)	206 (32.49%)	426 (67.72%)
2006	37*	15 (40.54%)	21 (56.76%)	17 (45.95%)	20 (54.05%)
2007	54*	31 (57.40%)	22 (40.75%)	18 (33.33%)	35 (64.81%)
2008	32	13 (40.63%)	19 (59.37%)	10 (31.25%)	22 (68.75%)
2009	38*	19 (50%)	17 (44.75%)	12 (31.58%)	26 (68.42%)
2010	45	19 (42.22%)	26 (57.77%)	15 (33.33%)	30 (66.66%)
2011	44	16 (36.36%)	28 (63.63%)	14 (31.81%)	30 (68.18%)
2012	36	9 (25%)	27 (75%)	12 (33.33%)	24 (66.67%)
2013	44	14 (31.82%)	30 (68.18%)	15 (34.10%)	29 (65.90%)
2014	44	17 (36.36%)	27 (61.36%)	13 (29.55%)	31 (70.45%)
2015	33	10 (30.30%)	23 (69.69%)	7 (21.21%)	26 (78.79%)
2016	39	17 (43.58%)	22 (56.41%)	17 (43.59%)	22 (56.41%)
2017	38	16 (42.10%)	22 (57.89%)	11 (28.95%)	27 (71.05%)
2018	56	25 (44.64%)	31 (55.35%)	22 (39.28%)	34 (60.71%)
2019	56*	21 (37.50%)	33 (58.93%)	15 (26.79%)	41 (73.21%)
2020	38*	13 (34.22%)	23 (60.52%)	8 (21.05%)	29 (76.31%)

*In 2006 and 2007, there was one judgement handed down each year in a procedure initiated by a third party. In 2009, 2019 and 2020, there were two judgements handed down each year in procedures initiated by third parties.

As can be seen, 58.51% of the procedures were initiated by the franchisor. We can see how the percentage fluctuates slightly over the years under analysis, with very slight variations, except in 2012 and 2015, where the percentage of litigations brought by the franchisor stands at around 70%, and in 2007 and 2009, where the percentage does not reach 45%.

With regard to the result of the rulings issued, it can be seen that 67.72% are favourable to the franchisor. It can also be seen that every year there are more judgements in favour of the franchisor than lawsuits brought by franchisees, which means that franchisees generally lose more cases than they initiate. If the average is analysed, franchisees initiate 40.22% of the procedures and lose 67.7% of the cases.

A comparison follows between the number of rulings handed down in the years under analysis with the number of existing franchisees and an analysis of the sectors with the highest degree of litigation.

In this comparison, only the years from 2010 to 2019 will be considered due to the fact that the source of information which collects the data on franchisees in Spain, and separates it by sector, has been extracting data and issuing its annual reports since 2010. It is not therefore possible to extend the data analysis of franchisees by sector to the years between 2006 and 2009.

In addition, due to the pandemic caused by COVID-19, it was not possible at the time to analyse the data on franchisees in 2020. Therefore, this report analyses the data up to the last statistical report issued by the AEF, corresponding to the data for 2019.

	TOTAL	NUMBER OF FRANCHISEES[3]	% DEGREE OF LITIGATION	JUDGEMENTS IN FAVOUR OF THE FRANCHISEE	% IN FAVOUR OF THE FRANCHISEE
TOTAL JUDGEMENTS	**435**	**478182**	**0.09%**	**141**	**0.03%**
2010	**45**	**42,433**	**0.10%**	**15**	**0.04%**
2011	**44**	**42,849**	**0.10%**	**14**	**0.03%**
2012	**36**	**41,179**	**0.08%**	**12**	**0.03%**
2013	**44**	**41,420**	**0.10%**	**15**	**0.04%**
2014	**44**	**44619**	**0.09%**	**13**	**0.03%**
2015	**33**	**46,125**	**0.07%**	**7**	**0.02%**
2016	**39**	**50,994**	**0.07%**	**17**	**0.03%**
2017	**38**	**53778**	**0.07%**	**11**	**0.02%**
2018	**56**	**56,753**	**0.09%**	**22**	**0.04%**
2019	**56**	**58,032**	**0.09%**	**15**	**0.02%**

[3] Data obtained from the annual reports of "La Franquicia en España. Estadísticas Nacionales" (Franchises in Spain. National Statistics) published by the Spanish Franchise Association.

htttp://www.franquiciadores.com/la-franquicia-espana/

The number of franchised premises between 2010 and 2019 rose by 15,599 (36.76%), as reflected in the official statistics of the AEF.

Nevertheless, the degree of litigation over 2010 to 2019 remains stable and is certainly low, with an average percentage of 0.09% in relation to the number of establishments open to the public on a franchise basis in Spain. In addition, if the number of judgements in favour of the franchisee is analysed in relation to the number of franchises open to the public, the percentage falls to 0.03%.

The two sectors with the highest historical litigation rates over the ten years under analysis are the Hospitality and Catering sector, with a total of 54 proceedings, and the Fashion sector, with a total of 51 proceedings. These sectors are followed by the Aesthetics and Beauty sector, with a total of 39 litigations, the Transport Services sector with 39 proceedings, and the Financial Services sector, with 31 proceedings.

While the Hospitality, Catering and Fashion sectors are the sectors with the highest number of brands and franchisees, the Financial Services sector has an anomalous degree of litigation.

In this regard, and according to the AEF report “Franchising in Spain 2020”, of the 1,381 franchise brands in Spain in 2019, the sector with the largest number is Fashion, with a total of 242 franchises, 5 fewer than the previous year, and 5,883 franchisees.

This largest sector is followed by Hospitality and Catering, with 207 chains, 11 more than in 2018, and 7,067 franchisees.

In contrast to the above, we can see how the Financial Services sector has a total of 16 franchise brands, one more than in the previous year, and 462 franchisees.

If we compare the specific weight of these sectors as a whole, we can see that in the first two sectors the litigation rate is equivalent to the number of franchised premises, while in the Financial Services sector it is much higher.

Accordingly, the percentage of premises in Hospitality and Catering with respect to the total number of franchised premises
is 12.18% and the percentage of litigations is 12.41%.

On the other hand, in the Fashion sector the percentage of franchised premises with respect to the total is 10.14%, while the percentage of judgements is 11.72%.

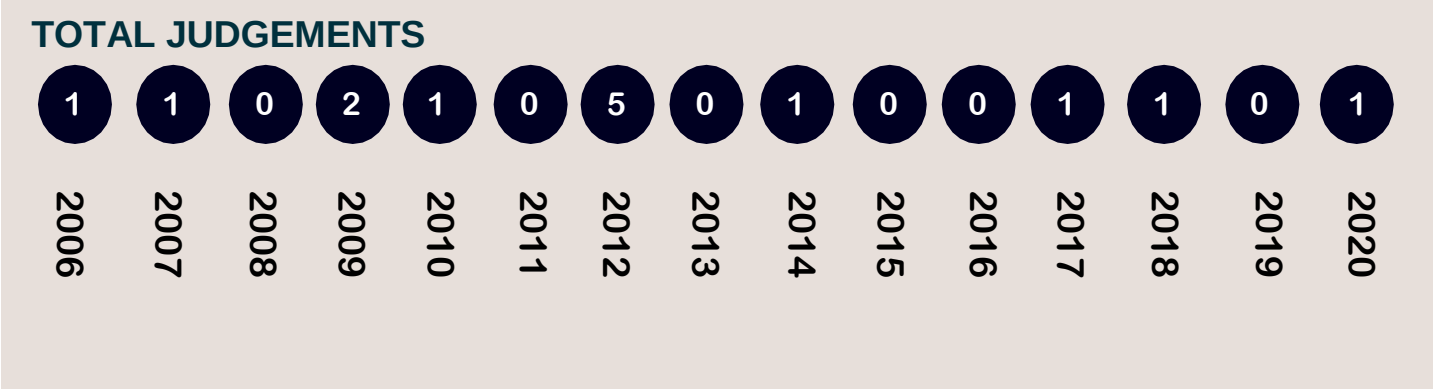
However, in the Financial Services sector, whilst the percentage of franchised premises is 0.80%, the number of litigations with respect to the total is 7.13%.

The conclusion to be drawn is that while the Hospitality and Catering sector and the Fashion Sector are those which accumulate the most litigation, this is due to the fact that they have a high number of franchised premises. The Financial Services sector, in contrast, has an anomalous degree of litigation.

Supreme Court Judgements

We have eliminated all reference to cases in which the appeals to the Supreme Court were declared inadmissible in order to focus on an analysis of the judgements.

As can be seen in the chart, the 14 judgements of the Supreme Court (Civil Chamber) between 2006 and 2020 show that the franchise system, despite being firmly established legally, presented in the aforesaid period an unquestionable annulment interest:



On this point, it should be noted that in the last year, 2020, the Supreme Court issued a total of 4 decisions declaring inadmissible appeals for annulment on the grounds of formal errors in relation to franchises. This allows us to conclude that there is sufficient case law and that the Supreme Court has not found sufficient annulment interest in the cases filed in the last two years.

Qualitative assessment of Case Law

On preparing the different editions of the "Observatory of Franchise Case Law in Spain", which we started in 2017, we have had the opportunity to verify that extending the number of years under analysis in each edition of the Observatory did not imply, however, a substantial modification of the qualitative assessment of the Case Law analysed in each edition. The qualitative conclusions do not reflect substantial differences in this new edition either. As in the previous editions, the analysis of the Case Law related to the conflicts arising from the franchisor-franchisee relationship allows the matters that are brought before the courts to be segmented into six main issues.

It is irrelevant for these purposes whether the proceedings have been initiated by the franchisor or by the franchisee since, in most cases, the defendant counterclaims and, in practically all of the analysed past cases, the franchisor is finally forced to provide evidence of correct and proper compliance with its three main obligations, namely: (1) assignment of the peaceful use of the brand; (2) the transfer of know-how; and (3) the initial and continued assistance in line with a franchise business. Another frequent issue is the profitability of the franchised business.

We now turn to the main areas that are liable to judicial review in the most recent rulings:

(I) NULLITY OF THE FRANCHISE AGREEMENT DUE TO DEFECTS IN THE FRANCHISEE`S CONSENT

In some of the rulings analysed, franchisees filed legal actions based on the alleged nullity of the franchise agreement due to defects in the consent given, taking into account the rationale summarised below:

– Nullity of the agreement was requested alleging defects in the consent given by the franchisee.

– Absence or insufficiency of the pre-contractual information provided by the franchisor was alleged as the cause of error in the consent granted by the franchisee, who argues that if they had received such information or had received it in full, they would not have given their consent to the agreement.

– The difference between the economic results obtained by the franchisee in the operation of its business and the corporate accounts provided by the franchisor prior to conclusion of the agreement has also been alleged in different procedures.

Case Law is unanimous in the sense that a franchise agreement does not constitute a promise of results to the franchisee, with the latter taking on the risk of the business activity.

(II) NULLITY OF THE AGREEMENT DUE TO LACK OF PURPOSE THEREOF AND BREACH OF OBLIGATION TO REGISTER IN THE REGISTRY OF FRANCHISORS

The non-existence of know-how is argued, both as grounds for nullity of the agreement and, on occasions, as grounds for termination thereof, alleging a breach by the franchisor of the obligation of transferring the aforementioned know-how to the franchisee. The rulings tend to value the accreditation of the transmission of know-how not only by means of the delivery of the Franchising Manuals to the franchisee, but also through the existence of the training programmes, operational or functional elements and assistance and/or supervision tasks deployed by the franchisor. Case Law has evolved to accommodate an enhancement in the concept of know-how, which initially was identified as “secret knowledge of an industrial nature” and has progressively evolved to include knowledge of a “commercial nature”. The rulings issued in the oldest legal proceedings resolved the issue, now peacefully overcome, of the failure of the franchisor to register in the Registry of Franchises as grounds for nullity of the agreement. From the beginning and on an ongoing basis, judicial rulings have limited the consequences of such an absence to a purely administrative scope and without any inter-party consequence, denying that the same could be grounds for the nullity of the franchise agreement.

(III) BREACH BY THE FRANCHISEE DUE TO NON-PAYMENT OF ROYALTIES

This is possibly the most common cause of the initiation of litigation between franchisor and franchisee. This is a breach that the franchisee usually tries to counter by alleging the existence of previous breaches attributable to the franchisor, such as the lack of transmission of know-how and the absence of training or commercial and/or technical assistance. With this, the procedure, as indicated above, becomes an examination of the degree of compliance by the franchisor with its own contractual obligations. Only the existence of a previous breach attributable to the franchisor allows the franchisee to evade its obligation to pay royalties. The judgements analysed mostly rule as to the non-existence of previous breaches by the franchisor and consequently declare the existence of the breach of the franchisee due to non-payment of royalties.

(IV) BREACH BY THE FRANCHISEE DUE TO INFRINGEMENT OF POST-CONTRACTUAL NON-COMPETITION CLAUSE

The breach leading to the claim occurs in two different circumstances:

– The first is that the franchisee continues, after the end of the term of the agreement, performing an activity that competes with that of the franchisor (where this is prohibited in the agreement).

– The second is where the agreement is terminated early as a result of a contractual breach by the franchisee and the latter continues performing an activity that competes with that of the franchisor (where this is prohibited in the agreement).

The rulings require there to be no prior breach by the franchisor for the latter to be able to demand the franchisee's compliance with its post-contractual non-competition obligation. The rulings allow the application of the prohibition of post-contractual competition, as well as the possibility of establishing penalty clauses in the event of a breach of said obligation by the franchisee, although the amount of said penalty clause may be moderated by the judge if deemed disproportionate. There are also different rulings that oblige the franchisee to cease the activity due to the breach of its post-contractual non-competition obligation.

(V) BREACH BY THE FRANCHISEE DUE TO MARKETING OF UNAUTHORISED PRODUCTS OR PRODUCTS FROM UNAUTHORISED SUPPLIERS

The enforcement by the franchisor of the suppliers from which the franchisee can (and must) purchase the materials that will be used in the operation of the franchise is sometimes questioned by the franchisee. The rulings consider that such an enforcement, and the consequent prohibition on purchasing products from other suppliers, is a logical consequence of the nature of the franchise agreement and of the power of control by the franchisor of the know-how that is transferred to the franchisee.

The power of control over products that the franchisee has to purchase either from the franchisor or from third parties with the prior authorisation and verification of the latter, is simply a consequence of the transfer to the franchisee of the know-how, i.e., the technical knowledge that is not in the public domain and that is necessary for the manufacture or marketing of a product or, where appropriate, provision of a service. This know-how provides an advantage to those who master it over competitors and efforts are made to preserve it and prevent its disclosure.

The obligations of the franchisee to supply itself through the franchisor with raw materials and any other goods related to the operation, and to purchase them from third parties with the prior authorisation of the franchisor, must be understood to be in accordance with the nature of the agreement and essential for the maintenance of the good name and image of the franchise network.

(VI) BREACH BY THE FRANCHISOR DUE TO FAILING TO PROVIDE TECHNICAL ASSISTANCE

The provision by the franchisor to the franchisee of commercial and/or technical assistance during the term of agreement is an essential obligation of the franchisor within the framework of a franchise relationship. This is established in the legal provisions and has been accepted without controversy by Case Law. Therefore, the absence or deficiency (understanding this as its uselessness for the purpose of providing the franchisee with advice regarding the actual activity to be carried out by the franchisee in the operation of the franchise activity) is considered a breach such as to be grounds for the termination of the agreement for causes attributable to the franchisor.

Judicial rulings consider a variety of instruments as valid means for the provision of assistance, such as commercial training, technical training, marketing and/or advertising advice and supervisory work deployed in the franchisee's establishment.

Some important judgements

Judgement of the Supreme Court of 18th October 2006: The franchisor brought back specific items of the operation and retained the price as guarantee of compliance by the franchisee of paying costs for Social Security and other items, specifying that the franchisor may apply said price, providing supporting evidence of the due settlement of the items that the franchisee should have paid.

Judgement of the Provincial High Court of Barcelona of 23rd February 2006: Petition for termination of the franchise agreement plus withdrawal of the distinctive signs from the premises and the abstention from performing competitive activities itself, or through natural or legal persons, that may compete with the franchise for a period of two years. The Court of First Instance declared the clause establishing a post-contractual non-competition obligation for two years following termination of the agreement null and void due to application of Regulation 4087/1988 of 30th November. But the Provincial High Court did not agree with this criterion for three reasons: (1) the aim of the regulation is to establish a number of criteria for exemption of anti-competitive practices provided for in Articles 81 and 85 of the Treaty and relate to concerted practices which may affect trade between Member States, which is clearly not the case; (2) said regulation does not provide for the nullity or voidability of such clauses; (3) the exclusion laid down in the regulation is established for clauses with a duration of one year, so that if it is considered that the Commission's criterion were applicable to the present case, and that its application produces inefficiency, the effect in this case would be that which exceeds the aforementioned period, i.e. one year, without the Court seeing any reason, either formal or material, to declare the non-competition agreement null and void in the first year.

Judgement of the Madrid Provincial High Court of 5th June 2006: The franchisor claimed that, once the agreement was terminated, the franchisee had broken the clause requiring non-competition for a period of one year by operating in the same premises as a business selling cosmetic products and providing beauty services and requested that the franchisee be ordered to immediately cease the activity and close the newly opened establishment and to pay damages of EUR3,056.06 plus a further EUR568.08 for each day the new establishment was open, as well as a further EUR6,012.12 as cumulative penalty.

At First and Second Instance, the franchisee was ordered to cease operating and close the perfumery, cosmetics and beauty services shop located in the premises, expressly declaring the prohibition to operate a business of similar characteristics and purpose in the same premises for a period of one year from the date of the effective termination; and to pay the franchisor the sum of EUR6,010.12, plus statutory interest, as compensation for the loss and damage resulting from its breach of contract.

Judgement of the Provincial High Court of Valencia of 20th December 2006: The claim of unpaid supply invoices did not in itself constitute sufficient grounds for the contractual termination of the franchise, and in addition, by tacit actions of the franchisor, the contract was already deemed to be terminated at the request of the franchisee. The failure to provide the guarantee together with the franchise agreement, when it is not required by the franchisor, cannot therefore be alleged as a breach.

Judgement of the Supreme Court of 16th March 2007: The franchisor Europcar IB, SA brought a lawsuit against MB Car Rental, SA claiming a sum for an alleged breach by the latter. The franchisee objected and counterclaimed for compensation for the damages caused by the unjustified termination of the agreement, which had left it unable to operate in the car rental market. The Court of First Instance partially upheld the counterclaim, declaring the non-existence of a breach of contract and ordered the plaintiff to pay PTS346,346,858 as compensation. The Provincial High Court fully upheld the judgement of the First Instance and rejected the appeal lodged by the franchisor, on the grounds that the unilateral and unjustified resolution of the agreement had led to the total collapse and consequent ruin of the company in operation. Europcar IB, SA filed an appeal in cassation against the judgement of the Provincial High Court. The Supreme Court analysed the grounds set out in the appeal and decided to partially reverse the contested judgement by reducing the amount of payment imposed on the franchisor as it did accept the damage as fact on the basis of the evidence provided.

Judgement of the Barcelona Provincial High Court of 10th January 2007: Absence of breach by the franchisor: lack of infringement of the exclusivity clause. Galeoconfort, SL filed a lawsuit against the franchisor, Ecocalor Eléctrico, SL, requesting the termination of the agreement as it understood that the defendants, franchisors of a central electric heating system, had seriously breached the franchise agreement by infringing the exclusivity reserved for the franchisee in the province of A Coruña. The defendants opposed the lawsuit and made a counterclaim requesting the loss of the territorial exclusivity granted to the counterclaim defendant as a consequence of a breach by the franchisee, which failed to achieve the minimum sales. The Judgement of First Instance dismissed the lawsuit in its entirety - with an order to pay costs - and, on the contrary, upheld the counterclaim on the grounds that the breaches attributed to the franchisee were proven. The Provincial High Court upheld the judgement handed down in the First Instance, indicating that the search for sellers by the franchisor through advertisements in a local newspaper cannot, in itself, constitute a breach of the exclusivity clause. For this purpose, it would be necessary that (i) the franchisee had seen its activity limited in the province of A Coruña as a result of this unlawful competition and (ii) these other competitors came from the same franchisor. These points were not proven in the proceedings.

Judgement of the Las Palmas Provincial High Court of 19th February 2007: Nature: difference with contracts for the supply or distribution of goods; settlement: compensation: determination of the resulting balance in favour of the franchisee. Escuela Internacional de Protocollo, SL, as franchisor, filed lawsuits requesting the termination of the franchise agreement due to a breach by the franchisee and claiming the sum of EUR37,436.21 for various items. The franchisee opposed this on the understanding that said business (i) could not be understood as a franchise agreement as it did not comply with the minimums established in the legislation regulating Retail Trade and (ii) it was ineffective as it had not been registered in the Registry of Franchisors. The Court of First Instance, after classifying the current agreement between the parties as a genuine franchise agreement, partially upheld the lawsuit, declaring the termination of the agreement and performance of the corresponding liquidation of the business, ordering the defendant to pay the sum of EUR9,701.78. The Provincial High Court agreed with the Court of First Instance's finding that the parties were

subject to a franchise agreement, with the fact that merely administrative formalities of prior registration had been omitted being irrelevant for civil purposes. From the evidence, the Court concluded that there had been mutual dissent, as the defendant had accepted the termination of the business relations, with the business subsequently to be liquidated and the balance resulting in favour of either of the parties to be determined.

Judgement of the Madrid Provincial High Court of 27th March 2007: Termination of the franchise agreement: risk of confusion: maintenance of the layout of the premises. The franchisor Jamaica's Franchisings S.L. filed a lawsuit against Sinclair Store S.A., on the understanding that, once the franchise agreements had been terminated, the franchisee carried out acts of unfair competition by continuing to use the franchisor's corporate image. Contrary to the contested judgement - in which the Court of First Instance dismissed the lawsuit in its entirety - the Provincial High Court upheld the appeal, on the grounds that the operation of the cafeteria constituted an act of unfair competition, as said establishment presented elements corresponding to the corporate image of the franchisor's network. Although the Court considered that the franchisee may continue to carry out the same activity in the establishment of the franchisor after the termination of the agreement, the Court concluded that the actions of the franchisee contravened the good faith of a competitive market to the extent that the activity had continued to be carried out with the same layout of the premises and under a commercial sign that was not sufficient so as to differentiate it from the previous one. Consequently, the franchisee was ordered to cease using the franchisor's distinctive elements in its establishment, and the premises were ordered to be closed until it effectively complied with the order.

Judgement of the Madrid Provincial High Court of 31st May 2007: The franchisor brought an action for damages, a claim for a non-compensatory penalty and a claim for unpaid amounts against the franchisee. The franchisee contested the claim and filed a counterclaim. The Court of First Instance, in response to the claim filed by the franchisor, found in favour of the latter on the grounds that the franchisee had unilaterally and unjustifiably terminated the franchise agreement. In addition, it considered that it had breached various clauses of the agreement, including the non-competition clause which gave rise to a non-compensatory penalty. In the Second Instance, the Provincial High Court once again reviewed the case, analysed the matter in detail, and partially upheld the appeal lodged by the franchisee, as it understood that the franchisor had previously breached the agreement. Therefore, the penalty clause, as well as the compensation for damages lacked consistency and basis, and the franchisee was awarded EUR68,437.77 as damages for loss of business.

Judgement of the Madrid Provincial High Court of 10th July 2007: Nature of the contract concluded: franchise agreement, or distribution of goods or concession. The franchisee claimed that in the First Instance Judgement there was an improper assessment of the existence of a franchise agreement. The franchisee stated that it was an agreement for the distribution of goods or a concession agreement. Following the case law, the Provincial High Court understood that the agreement entered into between the franchisor and the franchisee contained all the necessary features to be considered an agreement formalised as a franchise agreement (exclusivity area, transmission of know-how, training etc.). The nature of the agreements is determined by their actual content, not by the name given to them by the parties and the examination of the evidence showed that the agreement entered into was a franchise agreement, not only as a result of the name that the contracting parties gave to it,

but fundamentally as a result of its content.

Judgement of the Alicante Provincial High Court of 26th September 2007: Infringement of Community trademarks No 1,755,636 and 3,236,619 due to the existence of a likelihood of confusion between two trademarks. Damages. The "bear" standard of Tous, registered as Community trademark No 1,755,636, from a visual point of view, cannot be confused with the sign used by the defendant. Consequently, there is no infringement of the Community trademarks. What is being argued is that, given the close connection between the companies belonging to the Tous Group, and making use of the doctrine of lifting the corporate veil, the compensation it grants for lost profit (the hypothetical royalty) will revert to said Group and, therefore, and fundamentally, to the company that created it, which is none other than S. Tous S.L., owner of the rights. Compensation should not therefore be paid to the appellant, nor should the issues raised regarding the quantum thereof be addressed.

Judgement of the Barcelona Provincial High Court of 4th February 2008: The franchisee filed an action for compensation of damages caused by a contractual breach by the franchisor, for the amount of EUR152,285.76. The franchisor terminated the franchising agreement unilaterally because the franchisee failed to establish the guarantee of payment provided for in the agreement itself. The Provincial High Court ratified the Judgement of the Court of First Instance that dismissed the action for breach of contract on establishing that the franchisor did not commit a breach of contract of any kind and therefore the unilateral termination of the franchising agreement by the franchisor was justified in view of the franchisee's failure to establish the guarantee of payment provided for in the agreement itself.

Judgement of the Barcelona Provincial High Court of 14th February 2008: The franchisee filed an action for termination of contract in relation to what it calls a "trade partnership agreement". The action filed by the franchisee was dismissed as there was no evidence of a breach by the franchisor. The classification or determination of the nature of the legal transaction depends on the intention of the contracting parties and on their declarations of intent, and not so much on the name attributed to it by the parties.

Judgement of the Madrid Provincial High Court of 17th April 2008: There was a subrogation in the position of the franchisee. The latter filed a lawsuit requesting the nullity of some clauses as being contrary to the General Conditions of Contract Act. The Court of First Instance understood that upon subrogating itself, it had explicitly and expressly accepted all the clauses and, therefore, it excluded their status as general conditions of contract. The High Court concluded that the fact that a subjective novation of the agreement existed or that the party to the franchise agreement extends the contractual relationship or does not dissociate itself from it if can do so, does not change the nature of its contractual intent or eliminate the characteristics of generality, predisposition and imposition of the general conditions which may make up the agreement. Consequently, one of the clauses contested by the franchisee was considered to be null and void.

Judgement of the Madrid Provincial High Court of 11th July 2008: The Court declared that the failure to register in the Registry of Franchisors is an administrative breach and does not alter the contractual relationship of the two parties. Furthermore, it considered that evidence was not provided that the prices established by the franchisor exceeded normal market prices. The franchisee cannot invoke unilateral price fixing as grounds for nullity if it has not been raised, either as a counterclaim, or as grounds for terminating the agreement. The Court accepted price fixing by the franchisor given that it does not involve breach of contract. Surprisingly, the judgement did not mention the legal competition provisions. The Court considered that, even with the existence of delays in the delivery of products, these are not as such to constitute a serious breach. It considered that sufficient information had been provided to the franchisee, because the activity carried out by the latter did not require the "know-how" that the franchisor could offer. The Court rejected as criteria for determining compensation easy solutions such as those of multiplying by 4 the earnings of 1 year. The fact that, with the abandonment of the franchisee, a franchise could be arranged with third parties, was taken into account.

Judgement of the Malaga Provincial High Court Judgement of 3rd September 2008: The franchisee signed a franchise agreement for five years and simultaneously a premise lease agreement for one year without a right to renewal marketed by the franchisor. The nullity of the franchise agreement was requested on the grounds of a defect in consent as the term of the consent did not match the term of the lease. The Court considered the existence of an information deficit on the part of the franchisor which misled the franchisee by leading to a defect in its consent. It considered that the term of the lease was an important element for the conclusion of the agreement. The restoration of benefits was established by the Court.

Judgement of the Madrid Provincial High Court of 27th January 2009: The franchisor filed an action against the Franchisee, requesting the termination of the franchise agreement, and claiming the amount of EUR387,567.06 for various reasons. The Court of the First Instance partially upheld the action, as it considered that the franchisee had committed one breach (that concerning non-payment of some invoices) but found that it was not such as to justify the termination of agreement. The Provincial High Court dismissed the appeal in its entirety and upheld the Judgement of the Court of First Instance, as it had been demonstrated that the other breaches alleged by the franchisor had not taken place, as (i) the contractual novation carried out through the promotion of the 2x1 system was constructed as a vested right and could not be unilaterally modified by the franchisor to the detriment of the Franchisee, (ii) it had not been established that a debt existed in favour of the franchisor in terms of franchise or advertising royalties, and (iii) the franchise agreement did not reflect the franchisee's obligation to pay the amount corresponding to the software licences, with it having been established, moreover, that the franchisor decided to acquire these licences without notifying that their cost would be passed onto the franchisees.

Judgement of the Supreme Court, Civil Chamber, 30th June 2009: The franchisee filed an action against the franchisor requesting nullity of the franchise agreement due to a defect in consent or, subsidiarily, the termination of the agreement due to breach of contract by the franchisor. In both cases, the franchisee demanded compensation for damages of EUR369,388.66

The Court dismissed the request for nullity due to a defect in the consent of the franchisee as the franchisee already had three other franchising premises, the partners had previous experience and no complaints were made or further information requested until the poor economic results of the business occurred, and the forecasts provided were well-founded, even if they were not subsequently fulfilled.

Judgement of the Supreme Court, Civil Chamber, of 30th July 2009: The franchisor filed an action requesting termination of the franchise agreement due to a breach by the franchisee. The franchisee contested this action and made a counterclaim requesting the declaration of nullity of the franchise agreement because of the prices imposed by the franchisor on the franchisee. The Judgements of the Courts of First and Second instance declared the nullity of the franchising agreement on considering the prices to be imposed. Both rulings concluded that there was not a mere price recommendation but a real imposition by reference to price lists, which the franchisee was obliged to adhere to. Although it did not affect all of the supplied products, it was enough that it only affected some of those served by the franchisor, and the sale [resale] at the indicated prices affected the sales margin, thus affecting the franchisee's revenue and consequently the royalty to be paid for the franchise. The Supreme Court considered that the reasoning of the Provincial High Court was correct.

Judgement of the Barcelona Provincial High Court of 22nd December 2009: The ruling was about the method of conclusion of the franchise agreement, discussing the effectiveness of a verbal franchise agreement. In this respect, the High Court concluded that the franchise had been agreed verbally, even though the franchisee had not signed the agreement. It had been demonstrated according to the High Court that the franchisee carried out conclusive acts as a franchisee (it carried out operations and acts as franchisee, a geographical area was reserved for it, it paid amounts on account as a franchise reservation). Therefore, it concluded that given that the principle of the spirit of the law prevails in the Spanish legal system, then if the requirements structuring the agreement exist, albeit verbally, the agreement is deemed to be concluded.

Judgement of the Valencia Provincial High Court of 8th March 2010: The franchisor claimed from the franchisee amounts corresponding to sales made to end customers. However, the documentary evidence that served to support the claim was not only written by the plaintiff, but it also revealed some very complex commercial relations; and, given the lack of an expert's opinion, the debt claimed was considered not proven.

Judgement of the Supreme Court, Civil Chamber, of 5th November 2010: The franchisor requested: (i) the declaration of termination of the franchise agreement; (ii) the payment of the amounts owed due to a breach by the defendant; and (iii) the damages provided for in the penalty clause. The lawsuit was partially upheld, and the franchise agreement was terminated and the franchisee was ordered to pay the royalties for advertising and performing liquidation campaigns without the franchisor's authorisation, but the imposition of a penalty clause was rejected. The Provincial High Court rejected the penalty clause for a different reason: because it considered that as it was not appropriate in the event of a bankruptcy or of not reaching the minimum sales, it should not be applicable in the event of an economic crisis. The Supreme Court considered that the reasoning of the Provincial High Court was correct.

Judgement of the Seville Provincial High Court Judgement of 13th December 2010: The franchisees requested the nullity or annulment of the franchise agreements due to a defect in consent or that, alternatively, termination of the agreement be declared and the franchisor condemned for breach of contract with compensation in any case for the loss and damage caused to the franchisees. The Court rejected the action for nullity or annulment because it considered that the defect in consent had not been proven. However, it found in favour of the existence of a serious breach of obligations incumbent on the franchisor. The document submitted as a Manual to make such an understanding possible was “so generic and includes such simple specifications”, that in no way could it be understood as expressing a will to comply with the obligation of advice inherent to the activity that, like any business launched on the market –such as a franchise – requires greater complexity. The Court went so far as to affirm that the franchisor left the franchisees “in the air", with such conduct being completely unacceptable in a franchise relationship, in which one of the essential obligations of the agreement is the transmission of business know-how by the franchisor to the franchisees. Finally, the franchisor was ordered to compensate the franchisees for the damage and loss that the breach of its obligations had caused them and rejected the counterclaim made by the franchisor, because having breached its contractual obligations, it could not require its franchisees to comply with theirs.

Judgement of the Madrid Provincial High Court of 29th April 2011: The franchisee filed an action against the franchisor, requesting its right to compensation for customers to be recognised, on the understanding that the termination of the franchise agreement by the franchisor was unilateral and unjustified. The Court of First Instance had dismissed the claim in its entirety, and so the franchisee filed an appeal. The Provincial High Court dismissed the appeal is it considered that the contractual termination initiated by the franchisor was in accordance with the law, insofar as it had been proven that the franchisee had committed the breaches that led to that termination. However, the Court made it clear that “had the plaintiff proved the unilateral and unjustified termination of the franchise agreement, compensation could have been considered if the damage had been proven within the parameters of the agency agreement itself, Article 28 of which does not conflict with the franchise agreement entered into by the parties and which gave rise to this dispute”.

Judgement of the Barcelona Provincial High Court 16th May 2011: The franchisee filed an appeal requesting: (i) the nullity of various clauses of the franchise agreement, specifically, articles of the agreement relating to the payment of royalties, sales prices to the public, obligations of the franchisor to the franchisee before the start of the activity etc. and (ii) the franchisor be ordered to comply with all of the clauses relating to respecting territorial exclusivity, advertising rules and amendments to the agreement. The High Court declared the following clauses null for violating Article 1,256 of the Civil Code by leaving in the hands of only one of the parties the setting of an essential element of the agreement: (i) the clause in the agreement whereby the franchisor, through a simple communication, "reserves the right to modify the values of [the] royalties", and (ii) the clause in the agreement which obliges the franchisee to provide in the establishment identified with the trademark "the (services) that shall be provided by the franchisor in the future". Consequently, the Court made it clear that a new agreement of intention would be needed between the parties on both issues. The Court went so far as to state that the prerogatives assumed by the franchisor in the clauses relating to the organisational aspects of the franchise did not constitute a breach of the Law.

Judgement of the Supreme Court, Civil Chamber, of 27th February 2012: The franchisee alleged before the Court that there was a defect in consent at the time the agreement was entered into. It was determined that such a defect did not exist, since the franchisee knew that the franchise was new and that the viability plans had not yet been verified. The franchisee could have contacted the directors of the other three pilot establishments that had been operating for a year, and the franchisee also had experience in the sector.

Judgement of the Supreme Court, Civil Chamber of 18th July 2012: Case Law requires that, in order to be able to request the unilateral termination of the franchise agreement, by virtue of a breach made by the opposing party, such a breach must relate to a principal and reciprocal obligation, the breach of which frustrates the legitimate expectations of the parties or their economic interests. Therefore, it must be a breach such as to be considered serious since it violates the purpose of the agreement.

Judgement of the Supreme Court, Civil Chamber, of 30th July 2012: The franchisor granted exclusive areas to the franchisee. However, the franchisor reached an agreement with El Corte Inglés to perform within its establishment, and consequently within the franchisee's exclusive area, activities related to the marketing of the franchise's own products. This fact ends up causing identical or even worse effects, since the relationship between the franchisor and El Corte Inglés is a hidden contract and unknown to the other franchisees. The Supreme Court consider that the franchisor had infringed the exclusivity clause and caused an essential breach of contract, as it destroyed the trust that is required and substantial to collaboration agreements. Similarly, the Court ruled those reasonable expectations of profit, indicated pre-contractually, cannot be confused with a hypothetical loss of profit, duly quantified and accredited.

Judgement of the Supreme Court, Civil Chamber, of 22nd October 2012: The franchisee did not dispute or contest invoices made during the term of the agreement. When the agreement was terminated, the franchisee attempted to reclaim them with a legal action. The Court rejected the lawsuit because it considered that the action was contrary to estoppel. The invoices should have been challenged at the appointed time, otherwise the franchisee gives the appearance that it was satisfied with them.

Judgement of the Burgos Provincial High Court of 5th April 2013: The franchisor initiated a procedure requesting that the franchisee be ordered to pay the outstanding royalties up to the agreement expiry date and EUR90,151,82 as a penalty clause due to the infringement of the non-competition clause in the years following termination of the agreement. The Court partially upheld the appeal filed by the franchisor, deeming the non-competition clause to be valid and the franchisor entitled to compensation for infringement of said clause, but reduced the sum to EUR9,000. The reasoning of the Court was the following: the usefulness of the non-competition clause lay in the fact that, once the agreement had ended, the franchisor would not be hindered by the competition of its former franchisee. However, if the franchisor has not shown signs of wanting to continue operating the business in that area, as in this case, the damage to the franchisor would be minimal. Therefore, the compensation should also be minimal.

Judgement of the Seville Provincial High Court Judgement of 18th July 2013: Despite the franchisee operating the business properly, it did not fulfil the expectations that the franchisor had indicated. Finally, the franchisee terminated the agreement after various novations accepted by the franchisor, who was aware of the situation of the franchise. The termination requested by the franchisee did not comply with the time frames agreed in the agreement. However, the Court understood that this could not be considered as a material breach, since the franchisee could not be forced to continue with the operation of a loss-making and ruinous business, whose losses were not attributable to the performance of the franchisee.

Judgement of the Barcelona Provincial High Court of 24th July 2013: Declared the nullity of three clauses for infringing the General Conditions of Contract Act and the Bankruptcy Act: (a) the clause that allowed the termination of the agreement in the event of insolvency proceedings, b) the clause that allowed the franchisor to terminate the agreement in case of a change of ownership of the company, change of management body or "*mortis causa*" succession, c) the clause that established a daily penalty of EUR1,600 in the event of any violation of the agreement by the franchisee if not remedied within a term of 30 days.

Judgement of the Barcelona Provincial High Court of 10th October 2013: The franchisee dissociated itself from the franchise agreement without terminating the agreement. The franchisee changed the name of the business and continued to provide the same services. In the agreement there was a prohibition of competition during the contractual relationship and in the year after its termination. The franchisor noted a significant drop in sales and verified that the franchisee was providing identical services under another name. The Court determined that there was unfair competition, since the agreement had not been terminated, and even if it had been, the non-competition clause was perfectly valid and applicable beyond the term of the agreement.

Judgement of the Balearic Islands Provincial High Court of 17th October 2014: As a consequence of the collapse of the real estate system, it was decided to apply the r*ebus sic stantibus* clause and reduce the royalties of the franchise agreement.

Judgement of the Valencia Provincial High Court of 19th January 2015: Since this was a dispute involving trading companies, rather than consumers, it should be the trading companies that submit to the debate and discussion of the process the EU rules that were allegedly infringed in relation to the facts discussed. Since the defendant, in its counterclaim, confined itself to requesting the non-application of the non-competition clause, but not because of its illegality, but rather because it was not appropriate, the Court of Appeal was unable to make any declaration in this regard.

Judgement of the Castellon Provincial High Court of 22nd July 2015: The franchisee's claim stating that certain behaviours, having been declared encroachment in the United States, were valid and fair pursuant to Spanish legislation was dismissed by the Court. The Provincial High Court accepted that the White Paper allowed franchisees to ascertain the requirements that they must meet in order to be eligible to sign a new franchise agreement, but the Provincial High Court also recognised that even if a franchisee were to meet all the requirements, the franchisor was not required to grant the Franchisee a new franchise agreement, because this was part of the franchisor's freedom of contract. This ruling was the first and most comprehensive precedent in Spain and probably in Europe in relation to encroachment and the non-binding nature of the franchisor's internal policies. [Defended by Jordi Ruiz de Villa].

Judgement of the Madrid Provincial High Court of 12th February 2016: Within the framework of a unilateral termination of agreement, the franchisee could not prove that the franchisor had imposed a damaging pricing policy on it. If the prices that were imposed were abnormal within all the establishments that competed offering low prices, which was not proven, only then could the business intent have been considered breached.

Judgement of Las Palmas Provincial High Court of 14th May 2016: There was professional negligence by a doctor who did not provide the proper information to the patient on the consequences of the treatment they received. The civil liability of the franchisor with regard to the franchisee was declared in this case, given that it acted under the franchisor's instructions in using its material and techniques.

Judgement of the Madrid Provincial High Court of 19th October 2016: The nullity of the franchise agreement was requested due to the non-existence of know-how, but it was considered inappropriate since the fact that the business did not have long-term experience was not equivalent to a lack of know-how or the existence of error or deception. Furthermore, the claim that there had been a defect due to the lack of accounting data proving a certain success in the business, when this point was also unknown to the franchisor due to the incipient nature of the activity, was also dismissed. The franchisee had access to this information before signing the agreement, so it was not possible to assess these reasons as valid for the termination of the agreement.

Judgement of the Supreme Court, Civil Chamber, of 16th January 2017: The franchisee filed an action for the termination of the franchise agreement requesting, in addition, compensation for loss and damages, since the franchisor had granted a franchise to a competitor, which sold similar products of other brands in the area of exclusivity of the plaintiff. In short, there was a discussion about whether the franchise agreement granted an exclusive area for all similar products or specifically for those that were detailed in the franchise agreement. Finally, the Court ruled that the exclusivity had not been infringed, since, from the agreement, the circumstances and the background of the case, it followed that the exclusivity only affected the products and brands that were detailed in the agreement, and not others that had not been included.

Judgement of the Valencia Provincial High Court of 17th February 2017: Within the framework of a cosmetic surgery operation carried out in a franchised clinic, certain damage was caused to a patient who made a claim against the franchisor for medical liability. The franchisor opposed this by claiming a lack of capacity to be sued as it and the franchised clinic are independent companies. The High Court confirmed the Judgement of the Court of First Instance and understood that the franchisor was also responsible for the damage caused, despite the franchisor not being party to the agreement between the patient and the franchisee. The franchise agreement imposed on the franchisee a certain way of acting towards third parties. Moreover, in this case the franchisor appeared at all times as the entity that provided the services, leading the patient to trust in its prestige and trade name as a guarantee of success for the operation. It should be noted that the agreement between the franchisee and the patient stipulated that, in order to cancel the operation, the franchisor had to be contacted directly.

Judgement of the Barcelona Provincial High Court Judgement of 30th June 2017: The Franchisee terminated a franchise agreement alleging several contractual breaches, such as lack of transfer of know-how, delay in the supply of inventory and increase in the stipulated investment. The Court ruled that the termination of the agreement was not correct, as these irregularities had not been proven. The franchisee was aware of the details of the franchise with which it was going to associate. Among other things, the franchisee knew that it was a new franchise. It cannot be required that every business system subject to a franchise must have such proven experience so as to eliminate practically any risk for the franchisee.

Judgement of the Valencia Provincial High Court of 10th July 2017: A few months after the end of the franchise agreement, the franchisee started a business which offered identical services to those carried out previously. The agreement specified a 10-year contractual and post-contractual non-competition clause. Similarly, in the event of non-compliance, a penalty clause of EUR600 per day was specified. The Court understood that the behaviour of the former franchisee was contrary to competition law, although it determined that the duration of the contractual non-competition clause was excessive, as was the penalty clause. The Court ruled that the period of non-competition would be two years and that the penalty clause would be EUR600 per month.

Judgement of the Burgos Provincial High Court of 10th April 2018: The Provincial High Court declared the unilateral termination of the franchise agreements concluded to be in accordance with the Law. The franchise was fictitious or merely nominal, since it did not incorporate the two essential elements of a franchise, namely, the existence of an original or novel business model or business activity created or carried out by the franchisor and the existence of a know-how or expertise arising from the business experience derived from the creation and development of the business.

Judgement of the Badajoz Provincial High Court of 17th May 2018: The Provincial High Court concluded that the franchise agreement was null and void when the franchisor imposed fixed sales prices under the conditions stipulated in the agreement, as this conduct was prohibited by law. A defective legal transaction does not produce any effects at any time. The agreements were born with an innate defect, hence the penalty should and could be applied from the very moment the agreement had been concluded.

Judgement of the Supreme Court, Civil Chamber, of 11th July 2018: The franchisor filed a lawsuit for contractual termination with an order for payment of EUR61,585.71 for unpaid royalties, of EUR90,000 for advertising fees and unpaid return expenses; and compensation for the non-return of the Franchise Manuals that included the know-how to the amount of EUR90,000 and, likewise, the amount of EUR12,000 for not withdrawing the brands and symbols. Both the Court of First Instance and the Ávila Provincial High Court rejected the franchisor's claims for not having complied with the contractual information obligations regarding sales forecasts. Finally, the Supreme Court dismissed the appeal in cassation and indicated that it was poorly formulated by not referring expressly to the consequences of the infringements of the franchisor's duty of pre-contractual information, which suggests that the Supreme Court would have liked to rule on this issue.

Judgement of the Madrid Provincial High Court of 4th October 2018: the Judgement of the Court of First Instance partially admitted the lawsuit lodged by the franchisor, declaring the franchise agreement terminated and ordering the franchisee to pay a sum of EUR18,966. The franchisee then filed an appeal alleging error in the assessment of the evidence, on considering the plaintiff's evidence of the breaches to be insufficient. The Court observed negligence on the part of the franchisor, since it did not attend to the electrical installation of the premises, generating difficulties in the progress of the business and forcing the franchisee to deploy a series of costly efforts. Therefore, the Court accepted the defence of "*non rite adimpleti contractus*", since the franchisor committed negligence in the matter relating to the electrical installation. Finally, the Court reflected on the Case Law of the Supreme Court regarding the principle of preservation of contracts, which gives an adequate response to the vicissitudes presented by contractual dynamics. Therefore, it upheld the appeal of the franchisee, declaring the termination of the franchise agreement inappropriate.

Judgement of the Barcelona Provincial High Court of 19th November 2018: the Franchisee filed an appeal against the Judgement of the Court of First Instance, which declared the franchise agreement terminated and ordered the franchisee to pay EUR63,794.63. The franchisee based the appeal on the non-receipt of adequate information (defect in consent) on the franchise agreement at the time of signing, which would determine the nullity of the agreement and an abuse of right by the franchisor. The Court finally ruled in favour of the franchisor establishing: (i) the franchisee could not be considered a consumer, ergo, the abuse of right alleged by the claimant could not be upheld; (ii) the alleged nullity of the agreement could not be considered, as this would require the omission of all information, which had not happened; (iii) and, in principle, all the allegations set out should not be taken into account, in any case error and fraud, as a defect in consent, had to be alleged by means of an action, not of a defence, and this was not the case.

Judgement of the Madrid Provincial High Court of 11th March 2019: The franchisor initiated an action, requesting the termination of the franchise agreement due to a breach by the franchisee. It requested compensation of EUR682,546.00, of which EUR81,546.26 corresponded to the incurred debt in terms of owed invoices and EUR601,012.10 corresponded to the application of the penalty clause. The breach attributed to the franchisee was having made sales outside the area of influence. The Court concluded that the termination clause set out in the agreement could only be understood from the perspective that what it was trying to avoid was that the actions outside the area of influence could harm another franchisee, with the franchisor obliged to protect the latter in its territorial scope. It was not proven here that the sale made outside the area of influence affected another franchisee. Therefore, it cannot be accepted that the cause for termination provided in the agreement exists. Thus, the Franchisee was ordered to pay the sum of EUR81,546.26 corresponding to the unpaid invoices.

Judgement of the Madrid Provincial High Court of 15th March 2019: This Judgement is notable because of the analysis carried out by the High Court on the penalty clause, specifically in reference to its functions, interpretation and moderation. The High Court established that the general Case Law of these clauses was contained in the Supreme Court Judgement of 30th March 2016, indicating that penalty clauses had two essential functions, coercive or of guarantee, and compensatory or of settlement. The function of guarantee occurs because the penalty clause compels the debtor to meet its obligations in view of the prospect of being forced to comply with the provisions stipulated in the penalty clause. The penalty clause also fulfils a settlement function, which is referred to in Article 1152 of the Civil Code, as the penalty replaces the compensation of damages in case of breach, exempting the injured party from proving the existence and quantity of the harm. In the case under discussion, it was considered that the agreed penalty clause was disproportionate and excessively severe as there was no real relation with the economic scope of the agreement that was grossly overestimated, such that moderation of the penalty to EUR10,000 was considered appropriate.

Judgement of the Seville Provincial High Court of 29th March 2019: The franchisor initiated an action claiming an amount against the franchisee and the application of the penalty clause, for a total amount of EUR106,935.43. The partners' capacity to be sued of the franchised company was discussed in this case. The High Court concluded that by signing the agreement, the franchisees accepted that status with all the consequences and all the obligations in the specific agreement, not just the legal entity but all those who were sued as partners. Thus, in the heading of the contractual document at the time of identifying the contracting parties, after doing so in respect to the franchisor, under the title "party of the second part" the names of all the defendants identified by their identity document, their address and even noting the percentage of shares in the co-defendant legal entity appear, and after this, "hereinafter the franchisee" was added. In other words, all those that appear referenced and listed as contracting party not only appear as third party, but they are also named "franchisees". Moreover, at the end of the agreement under the franchisor's signature and under the name "the franchisee" were the signatures and names of the individual partners who signed and initialled all the pages of the agreement. Consequently, the penalty clause was applied to them.

Judgement of the Rioja Provincial High Court of 2nd September 2019: The franchisee initiated a contractual termination procedure. It was discussed who should bear the burden of proof to establish the breach for which termination was sought. The ruling in respect to the burden of proof established that the breach was the responsibility of the party claiming it. Therefore, it fell to the plaintiff to prove that the defendant fundamentally breached the franchise agreement between the concerned parties and obstructed the purpose of the agreement, and that the plaintiff had met the contractual obligations which corresponded to it. Similarly, the judgement showed the differences between initiating a nullity procedure because of a defect in consent and a contractual termination procedure, concluding that the deduced action was an action for contractual termination due to a breach, not an action for nullity due to a defect in consent. This was due to the fact that a breach, due to its nature, must relate to the performance of the agreement, and what was alleged was a lack of veracity in the pre-contractual information which would have affected consent, which was connected with the pre-contractual phase of intent formation prior to the conclusion of the agreement and affected the validity of the agreement, therefore it could not effect termination of the agreement, as the termination operated at a later stage, that of implementation of the agreement, when there was a breach of a contractual obligation.

Judgement of the Tarragona Provincial High Court of 16th October 2019: The franchisor initiated a contractual termination procedure and a claim of payment for the non-payment of certain invoices by the franchisee. The franchisee initiated an action of nullity of the franchise agreement due to a lack of truthfulness in the pre-contractual information. The ruling covered three aspects: civil fraud, pre-contractual information and territorial exclusivity. The Judgement of the Court of First Instance was upheld in terms of declaring the nullity of the franchise agreement due to a lack of pre-contractual information provided to the franchisee. However, the judgement states that the declaration of nullity of the franchise agreement did not prevent the franchisor from claiming payment for unpaid invoices and it partially upheld the appeal, ordering the defendant to pay the amount claimed due to non-payment of invoices. In addition, the franchisee's counterclaim appeal was partially upheld and the franchisor was order to pay a compensation of damages caused by the termination of the agreement which had been declared null and void.

Judgement of the Barcelona Provincial High Court of 16th December 2019: The franchisee filed an action requesting termination of the franchise agreement due to a breach by the franchisor. The consequences of the termination of the franchise agreement and the difference between concession and franchise were discussed in the judgement. The High Court concluded that concession and franchise were two forms of doing business through partnership with a company that was already established in the market, but they differ in: (1) the form in which they are carried out: a concession is directed by an independent company, whilst a franchise is administrated by a franchisee. (2) Franchises have to pay their parent companies monthly fees to be able to use the trademark and moreover, the majority of the franchises also have to pay their "umbrella" companies a predetermined percentage of their total monthly sales, which does not apply to the owner of a concession. (3) In the case of franchising, the manager has to pay franchise fees, equipment, and other licences. The owner of a concession, in contrast, does not have to worry about such costs. They mainly incur costs in obtaining a licence and purchasing products. (4) The aim of a franchise is to meet the goals established by the franchisor. However, the owner of a concession sets its own aims and achieves them by itself.

Judgement of the Madrid Provincial High Court of 16th January 2020: Breach of the franchise agreement by discriminating against the franchisee, depriving it of services included in the so-called McDonald's System, or by unreasonably delaying its access to certain services, products, information and know-how that were part of McDonald's System, charging it for services not provided. The Provincial High Court understood that the franchisor had not breached the agreement, since it had not deprived the franchisee of the know-how and services included in the McDonald's System. Furthermore, membership of the Association of Licensees of the McDonald's System was voluntary for the plaintiff, which precisely for this reason decided to withdraw from it, ceasing to contribute its funds to serve Association. Consequently, apart from the fact that no action has been deduced in the procedure in question against said association, what is wrong is that the plaintiff intends to benefit directly and immediately from the actions carried out by the association within its objectives, when it neither belongs to said association nor contributed financially to it.

Judgement of the Barcelona Provincial High Cord of 29th May 2020: The franchisor requested that the agreement be declared terminated by mutual consent and brought an action for infringement of trademark rights. The franchisee objected as it considered that the franchise agreement should not be considered terminated. The Court declared the agreement terminated by mutual dissent. It is understood that, in order to determine mutual dissent as grounds for termination of a contract, it is necessary to have a sign that is contrary to that making up the contractual link. In this case, the Court understood that the franchise agreement existing between the parties was a verbal agreement. Therefore, for the contract to be considered terminated, no formality was required, with it being sufficient to have evidence of acts which reveal the common will (clear, unequivocal and conclusive) of the contracting parties to leave the concluded business without effect.

Judgement of the Girona Provincial High Court of 22nd June 2020: Two franchisees requested termination of their respective franchise agreements due to a breach by the franchisor and requested compensation for loss and damages. The requirements that Case Law requires for the application of Article 1,124 of the Civil Code (contractual termination) were not met. There had been no material and serious breach knowingly sought by the franchisor to circumvent the franchisees' rights: the fact that the franchisor company entrusted certain services (maintenance services) to its subsidiary company is not considered a breach of contract. The appropriation of the franchisees' customers was not considered to be proven either, as the customers assigned to the subsidiary were not the franchisee's own, but rather from the franchisor. The alleged infringements of unfair competition claimed by the claimants were not upheld.

Judgement of the Cadiz Provincial High Court of 16th September 2020: Failure of the franchisor to comply with the obligation to register with the Registry of Franchisors. Failure by the franchisor to register with the Registry of Franchisors results in a serious administrative penalty, but the franchise agreement concluded between a non-registered franchisor and a franchisee must be regarded as perfectly valid and effective. Likewise, the absence of a trademark at the time the agreement is entered into does not determine the invalidity of said agreement. There is therefore no invalidating defect in consent that would be grounds for the invalidity of the agreement.

Judgement of the Valencia Provincial High Court of 23rd September 2020: Capacity to be sued for non-contractual liability. A customer suffered a fall in a DIA supermarket because the floor was wet. The client sued Distribuidora Internacional de Alimentación, S.A. (franchisor), but the First Instance Judgement dismissed the claim, considering that the capacity to be sued corresponded to the franchisee. The Provincial Court considered that the customer cannot be required to sue the franchisee, as they have no reason to know that there is a franchise agreement and that it is another company that operates the supermarket, when the supermarket itself is advertised as DIA. However, it should be noted that between the franchisor and the franchisee there is a tacit joint and several liability aimed at facilitating the guarantee of injured parties, without prejudice to the claims for recourse that are formulated between them. Therefore, the appeal was upheld and the lack of capacity of DIA, S.A. to be sued was rejected.

Judgement of the Badajoz Provincial High Court of 20th November 2020 action for nullity of the post-contractual non-competition clause and the price-fixing clause. The Provincial High Court considered that, although it is true that the post-contractual non-competition clause included in the agreement is for five years, thus infringing European legislation (which limits the duration of said clause to one year), if this clause is adapted to the law (one year) the franchisee would have breached it anyway, since it already had another new store in operation just two months after the end of the contractual term, in which products similar to those of the franchisor were sold. With regard to the price fixing clause, the Court declared it null and void, since it imposed without discussion fixed prices that could be unilaterally modified by the franchisor and whose result on the existing stock - positive or negative - fell on the franchisee. Similarly, the nullity of restrictive agreements leads to them to be void *ab initio*. The lack of legal effects occurs ab initio. A defective legal transaction does not produce any effects at any time. The agreements were born with an innate defect, hence the penalty should and could be applied from the very moment the agreement had been concluded. Therefore, it is no longer necessary to analyse the possible nullity of the other contractual clauses to which the counterclaim refers, since, as has been noted, the nullity of the price-fixing clause presupposes the fundamental nullity, from the outset, of the contractual relationship.

Conclusions

1) From a quantitative point of view, it can be seen that the degree of litigation in the field of franchising is very low in relation to the percentage of establishments under franchising arrangements, maintaining an average litigation rate of 0.09%.

2) Based on the judgements, it can be seen that the largest number of proceedings are brought by the franchisor, with an average of 60.39%. The main action brought is the termination of the franchise agreement due to breaches (post-contractual competition clause), payment of royalties and claims for amounts owed.

3) A trend of rulings favourable to the franchisor is maintained with an average percentage of 67.72%.

4) There are more judgements in favour of the franchisor than lawsuits filed by franchisees, which means that in general terms franchisees always lose more cases than they initiate.

5) In numerical terms, it can be seen that the number of judgements initiated by the franchisor is tending to fall, although there has been a slight upward trend in recent years, while the number of proceedings initiated by the franchisee is gradually increasing.

6) The number of judgements fell considerably in 2020 compared with previous years, with a total of 38 judgements, while there were 56-57 judgements in 2018 and 2019. This is due to the COVID-19 pandemic and the second additional provision of Royal Decree 463/2020, of 14th March, which established the suspension of procedural deadlines in all jurisdictions, which caused a paralysis of the judicial system in its entirety, until 5th June 2020.

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